Information
and Privacy
Commissioner/
Ontario

A Guide to Ontario Legislation Covering the Release of Students' Personal Information

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Revised July 2003

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The Information and Privacy Commissioner/Ontario gratefully acknowledges the work of Mark Ratner in preparing this report.

This publication is also available on the IPC Web site.

Cette publication est également disponible en français.

103-06935/

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Introduction

School boards in Ontario operate in a complex legal environment in which various pieces of legislation must be taken into account when making determinations regarding access and privacy issues. The purpose of this paper is to provide students, parents and school board staff with a basic understanding of how the *Municipal Freedom of Information and Protection of Privacy Act* interacts with the *Education Act* to protect privacy and provide access to the personal information of students.

Applicability of access and privacy legislation

Governmental institutions in Ontario are governed by one of two applicable pieces of access and privacy legislation. The *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) applies to municipal institutions including public and separate school boards. The *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) applies to provincial institutions including provincial and demonstration schools operated by the Ministry of Education. Private schools are not subject to either of these *Acts*.

By virtue of the *Acts*, records that fall within the custody and control of school boards, including records of "personal information"[1] about students, are subject to the access and privacy provisions of both *Acts*.

With the exception of minor differences, both the municipal and provincial *Acts* are similar in terms of the obligations they impose on institutions. While references in this paper are to the municipal *Act*, in all cases similar provisions will be found in the provincial *Act*.

How do Ontario statutes operate to protect the personal information of students?

The municipal *Act* sets out the general rules that school boards must follow regarding the collection, retention, use and disclosure of personal information. In contrast, the *Education Act*, which is the principle statute under which boards operate, provides rules governing specific circumstances where access to information may be sought.

[1] "Personal information" is defined in both *Acts* as "recorded information about an identifiable individual."

What types of personal information do school boards collect?

Generally speaking, student records collected by school boards fall into one of two main categories: records that form part of the Ontario Student Record (OSR) and records that do not form part of the OSR. All public and separate school boards are required to create an OSR for each student. Other schools, including private and First Nations schools *may* elect to establish and maintain an OSR.

The OSR is the record of a student's educational progress through the school system in Ontario. The Ministry of Education's *Ontario Student Record (OSR) Guideline, 2000*[2] (the *OSR Guideline*) sets out the records that are to be contained in a student's OSR. They are: an OSR folder, all student report cards, an Ontario Student Transcript (where applicable), a documentation file (where applicable), an office index card and any additional information identified by the school as being conducive to the improvement of the instruction of the student.

In addition to the information collected in a student's OSR, schools may collect other forms of personal information that would also become subject to the *Acts*. Examples of non-OSR records include: permission slips allowing students to attend field trips, class lists, records of marks for tests and assignments, yearbook photographs of students with their names, and honour rolls.

Are school boards required to keep OSRs confidential?

Yes, by virtue of section 266(10) of the *Education Act*, school boards are required to keep OSRs confidential. They may only be disclosed in accordance with one of the specific situations contemplated by either that section of the *Education Act* (see Appendix A) or section 32 of the municipal *Act* (see Appendix B). The issue of disclosure is dealt with in greater depth on page 4.

Does the municipal *Act* limit the amount or kind of personal information a school board may collect?

Yes. To be in compliance with the municipal *Act*, school boards must possess the requisite legal authority to collect personal information. Section 28(2) sets out the three circumstances under which personal information may be collected on behalf of institutions that are subject to the *Act*. The collection of personal information must be: (1) expressly authorized by statute (i.e., provided for under an Act or a regulation under an Act); (2) used for the purposes of law enforcement; or, (3) necessary to the proper administration of a lawfully authorized activity. A board may not collect personal information unless one of these three circumstances applies.

[2] The *OSR Guideline* is available online, <mettowas21.edu.gov.on.ca/eng/document/curricul/osr/osr.html>.

Generally, the collection of personal information by a school board is authorized by statute by virtue of section 265(d) of the *Education Act*, which states that information may be collected in accordance with that *Act*, the Regulations or Guidelines issued by the Minister. Generally, the *OSR Guideline* permits the collection of information for purposes that are conducive to the education of the student (see Appendix F). Therefore, a collection of personal information that is not generally conducive to the education of a student (such as information on the personal political views of the student) would not be authorized under either the municipal *Act* or the *Education Act*.

Alternatively, even if a collection of personal information is not authorized under the *Education Act*, it may be justified under one of the other circumstances contemplated by section 28(2) of the municipal *Act*.

Does a school board need student or parental consent to collect personal information about a student?

Where a board possesses the legal authority to collect personal information, and it is collecting the information directly from the student or parents, the board does not require formal consent for the collection. Consent would be implied by the fact that the information is being provided directly to the school board.

Section 29(2) of municipal *Act* (see Appendix C) provides that where personal information is collected on behalf of an institution, the individual must be provided with notice of the collection, (which includes being informed of the legal authority of the collection; the principal purpose or purposes for which the personal information is intended to be used; and the title, business address, and business telephone number of an officer or employee who can answer questions about the collection). The most common way that boards can provide a notice of collection is by printing it on the form that is used to collect the information.

Can a school board collect personal information about a student from other sources?

A collection of personal information from a source other than the student or the student's parents is called an *indirect collection*. As with direct collection, the board must possess the legal authority to collect this personal information. Section 29(1) of the municipal *Act* sets out the situations under which indirect collection of personal information is permitted. The most common of these situations occurs where the individual consents to the collection. While consent may be given either verbally or in writing, it is generally advisable for boards to seek written consent so that a written record will exist of the consent.

If a board wishes to indirectly collect the personal information of a student from a source other than the student, without consent, then one of the other circumstances set out in section 29(1) of the municipal *Act* must apply.

What are the rules that boards must follow when they disclose a student's personal information?

Boards are not allowed to disclose a student's personal information unless one of the circumstances set out in the disclosure provision (section 32) of the municipal *Act* applies. For example, section 32(b) of the municipal *Act* provides that the disclosure of personal information is permissible with the consent of the individual. (In cases where the child is less than 16 years of age, consent may be obtained from a person having lawful custody of the child.) Section 32(c) provides for the disclosure of personal information for the purpose for which it was obtained or for a consistent purpose (i.e., a purpose the student or parents would reasonably expect). Further, section 32(g) of the municipal *Act* states that an institution may disclose personal information to a law enforcement agency in order to aid in an investigation.

It is important to note that these provisions are *discretionary*, rather than *mandatory*. For instance, section 32(g) does not require a school board to automatically disclose information pursuant to a request from law enforcement. Rather, school officials may choose to either disclose or not disclose information depending on the particulars of a given situation. Of course, other factors, such as the presence of a court-ordered search warrant, may preclude any such discretion on the part of the board.

Boards should also keep in mind section 266(2)(b) of the *Education Act*, which states that school records are privileged, and are not admissible at a trial without the consent of the parent. In at least one case, a court has found that it had the discretion to use this section to deny disclosure to the Crown.[3]

Because of the complex legal principles involved, we recommend that school boards consult with legal counsel when making a determination pertaining to disclosure.

What are the rules that boards must follow when they use a student's personal information?

As is the case with both the collection and disclosure of a student's personal information, boards are not permitted to *use* a student's personal information unless one of three circumstances set out in

[3] *R.* v. *Lewin*, [1991] O/J. No. 2418. (QL).

section 31 of the municipal *Act* applies. (See Appendix E.) Section 31(a) permits the use of personal information with the consent of the individual (e.g., a parent signs a consent form). Section 31(b) allows for the use of personal information for the purpose for which it was obtained or compiled, or for a consistent purpose (i.e., a purpose the parent or student would reasonably expect). Section 31(c) provides that personal information may be used, if one of the situations contemplated by the disclosure provision (see previous page), applies.

How does the *Education Act* apply to the Ontario education number?

The Ontario education number is a unique number that is assigned to each person who is enrolled in, or who seeks admission to be enrolled in, a prescribed educational or training institution. Section 266.2(2) of the *Education Act* authorizes the Minister of Education and prescribed educational and training institutions to collect, directly or indirectly, personal information for the purposes of assigning an Ontario education number to a student. (See Appendix G.)

Section 266.2 (3) of the *Education Act* provides that the notice provision in section 29(2) of the municipal *Act* does not apply to a collection of personal information for the purpose of assigning an Ontario education number.

Further, section 266.2 (4) of the *Education Act* permits the Minister of Education and prescribed educational and training institutions to use or disclose personal information for the purpose of assigning an Ontario education number and deems the disclosure to be for the purpose of complying with the *Education Act*.

Other provisions of the *Education Act* allow for Ontario education numbers to be collected, used, disclosed or produced for purposes such as the provision of educational services and for purposes related to education administration, funding, planning, research and for providing financial assistance to students. The *Education Act* also states that no person shall collect, use, disclose or require the production of another person's Ontario education number, except as provided by the *Education Act*.

At what age can a child exercise his/her privacy and access rights under the *Acts*?

A child of any age has the right to exercise his or her privacy and access rights under the municipal and provincial *Acts*.

How is a parent's right of access under the municipal *Act* affected by a child's age?

By virtue of section 54(c) of the municipal *Act*, the rights and powers of a child under the *Act* may be exercised by any person having lawful custody of the child. In regard to student records, this provision means that a parent with lawful custody of a child may consent to disclosure of a child's personal information or make a request for access to the student's records under the *Act* on behalf of the child. This statutory right of access to a child's information exists under both the municipal *Act* and section 266(3) of the *Education Act*, which confers a right of access to a student's OSR on a parent or guardian if the child is under the age of 18.

Does a parent without lawful custody of a child have a right to access the child's school records?

Yes. As discussed above, section 266(3) of the *Education Act* states that the parent or guardian of a child under the age of 18 is entitled to examine the OSR. Because the applicability of this section is not limited to "custodial parents," a non-custodial parent will have the legal right to access the child's OSR.

Further, in regard to non-OSR information, by virtue of provisions contained in section 20(5) of the provincial *Children's Law Reform Act* and in section 16(5) of the federal *Divorce Act*, a non-custodial parent who has access to a child has the right to make inquiries and to be given information concerning the child's health, education and welfare.

The IPC has held that the *Children's Law Reform Act* and the *Divorce Act* operate to give an access parent the right to access the personal information relating to the health, education or welfare of the child.[4]

How long are school boards required to keep records of personal information about students?

Section 5 of Regulation 823 under the municipal *Act* (Regulation 460 of the provincial *Act*) provides that personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a bylaw or resolution. Therefore, a school board is required to keep all student records for one year, unless a shorter retention schedule is established. In the absence of a shorter formal retention period, a board is permitted to dispose of personal information before one year has elapsed, where it has obtained the consent of the individual to its earlier disposal.

[4] IPC Order M-787, June 1996.

The purpose of the minimum retention period is to allow individuals to exercise their statutory right to access their own personal information under the *Acts*. The *Acts* do not specify a maximum time period beyond which the personal information of individuals cannot be retained.

The *OSR Guideline* establishes the relevant retention schedules for OSRs. The main parts of an OSR (the OSR folder, the Ontario student transcript and the office index card) are required to be retained for 55 years from the date the student leaves school. Other records (report cards, the documentation file and additional information that is identified by a school board as appropriate for retention) must be retained for five years after the student leaves school.

Can a parent or student request that certain records of personal information be destroyed or removed from the OSR?

The *OSR Guideline* (in accordance with subsection 266(4)(b) of the *Education Act*) provides for the removal of records from the OSR if the information is determined, according to the board's policies, to be no longer conducive to the improvement of the instruction of the student. The records may either be given to the parent or student, or destroyed in a confidential manner. There are no specific provisions in the municipal *Act* that allow for the removal of records of personal information. However, as discussed above, an individual may consent to the school's disposal of records of personal information before the expiry of the minimum retention period.

What can a parent or student do if they believe there is an error or omission in the personal information records of the student?

Both the provincial and municipal *Acts*, as well as the *Education Act*, have provisions that provide for the correction of an individual's personal information.

Under section 266(4)(a) of the *Education Act*, the parent or guardian of a student may request the correction of the personal information contained in their child's OSR, where they believe that information to be inaccurate. Where the student is an adult, he or she may make this request directly.

The process for correction is provided in the *OSR Guideline*, which states that a parent (or an adult student) must submit a written request to the school principal. Only matters of fact, not opinion, may be corrected.

Section 36(2) of the municipal *Act* gives individuals (including children) the right to request the correction of their own personal information that is in the custody of an institution. By virtue of section 54, which grants custodial parents the power to exercise rights under the *Act* on behalf of their child, the parent may make the request for a correction. If the board denies the request, the individual may require that a statement of disagreement be attached to the information.

What happens to the OSR and other student records if a child begins attending a new school or switches to a private school?

Where a student has transferred schools, the *OSR Guideline* mandates that the school principal must send the OSR to the new school. This transfer would be permissible as a disclosure of personal information pursuant to section 32(c) of the municipal *Act*, which permits the disclosure of personal information for the purpose for which it was compiled, or for a consistent purpose as described above.

Where the former school retains personal information about the student after he or she has transferred to another school, this information must be retained for the minimum time period (usually one year after use) as set out in the *Act*.

Additional information

Questions or comments regarding a school board's practices relating to the collection, retention, use and disclosure of students' personal information should be directed to the school board's Freedom of Information and Privacy Co-ordinator. Additional information may be obtained from the Office of the Information and Privacy Commissioner/Ontario.

Appendix A — *Education Act* – Section 266(10)

Secrecy re contents

266. (10) Except as permitted under this section, every person shall preserve secrecy in respect of the content of a record that comes to the person's knowledge in the course of his or her duties or employment, and no such person shall communicate any such knowledge to any other person except,

(a) as may be required in the performance of his or her duties; or

(b) with the written consent of the parent or guardian of the pupil where the pupil is a minor; or

(c) with the written consent of the pupil where the pupil is an adult.

Appendix B — *Municipal Freedom of Information and Protection of Privacy Act* – Section 32

Where disclosure permitted

32. An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part I;

(b) if the person to whom the information relates has identified that information in particular and consented to its disclosure;

(c) for the purpose for which it was obtained or compiled or for a consistent purpose;

(d) if the disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and if the disclosure is necessary and proper in the discharge of the institution's functions;

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament, an agreement or arrangement under such an Act or a treaty;

(f) if disclosure is by a law enforcement institution,

(i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or

(ii) to another law enforcement agency in Canada;

(g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification is mailed to the last known address of the individual to whom the information relates;

(i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;

(j) to the Minister;

(k) to the Information and Privacy Commissioner;

(l) to the Government of Canada or the Government of Ontario in order to facilitate the auditing of shared cost programs.

Appendix C — *Municipal Freedom of Information and Protection of Privacy Act* – Section 29

Manner of collection

29. (1) An institution shall collect personal information only directly from the individual to whom the information relates unless,

(a) the individual authorizes another manner of collection;

(b) the personal information may be disclosed to the institution concerned under section 32 or under section 42 of the *Freedom of Information and Protection of Privacy Act*;

(c) the Commissioner has authorized the manner of collection under clause 46(c);

(d) the information is in a report from a reporting agency in accordance with the *Consumer Reporting Act*;

(e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal;

(g) the information is collected for the purpose of law enforcement; or

(h) another manner of collection is authorized by or under a statute.

Notice to individual

(2) If personal information is collected on behalf of an institution, the head shall inform the individual to whom the information relates of,

(a) the legal authority for the collection;

(b) the principal purpose or purposes for which the personal information is intended to be used; and

(c) the title, business address and business telephone number of an officer or employee of the institution who can answer the individual's questions about the collection.

Exception

(3) Subsection (2) does not apply if,

(a) the head may refuse to disclose the personal information under subsection 8(1) or (2) (law enforcement);

(b) the Minister waives the notice; or

(c) the regulations provide that the notice is not required.

Appendix D — *Education Act* – Section 266(2)

Pupil records privileged

266. (2) A record is privileged for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil, and such record,

(a) subject to subsections (2.1), (3) and (5), is not available to any other person; and

(b) except for the purposes of subsection (5), is not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding, except to prove the establishment, maintenance, retention or transfer of the record, without the written permission of the parent or guardian of the pupil or, where the pupil is an adult, the written permission of the pupil.

Appendix E — *Municipal Freedom of Information and Protection of Privacy Act* – Section 31

Use of personal information

31. An institution shall not use personal information in its custody or under its control except,

(a) if the person to whom the information relates has identified that information in particular and consented to its use;

(b) for the purpose for which it was obtained or compiled or for a consistent purpose; or

(c) for a purpose for which the information may be disclosed to the institution under section 32 or under section 42 of the *Freedom of Information and Protection of Privacy Act*.

Appendix F — Excerpt from the *OSR Guideline*

School boards are responsible for ensuring compliance with the policies set out in this guideline. Boards will specify those persons responsible for performing clerical functions with respect to the establishment and maintenance of the OSR. Boards will also develop policies for determining:

- the types of information beyond those specified in this guideline that could be considered to be conducive to the improvement of the instruction of the student;
- the uses of the information and materials contained in the OSR beyond those specified in this guideline (see section 3.4);
- the relevance of the materials in the OSR, with a view to removing those no longer considered to be conducive to the improvement of the instruction of the student (see section 9);
- the times other than those specified in this guideline at which it could be considered appropriate to issue report cards (see section 3.2.3.1);
- the types of information beyond those required by this guideline that could be added to the office index card (see section 3.5).

In addition, boards will develop procedures to be followed to ensure:

- the security of the information contained in the OSR, whether it is maintained electronically or in hard copy, during both the period of use and the period of retention and storage;
- the regular review of the OSR for the removal of any material that is no longer considered to be conducive to the improvement of the instruction of the student;
- the storage of the OSR for the period specified in the retention schedule (see section 8);
- the complete and confidential disposal of material removed from the OSR.

Boards will ensure that all persons that they assign to perform clerical functions with respect to the establishment and maintenance of the OSR are aware of the confidentiality provisions in the Education Act and the relevant freedom of information and protection of privacy legislation.

It is the duty of the principal of a school to:

- establish, maintain, retain, transfer, and dispose of a record for each student enrolled in the school in compliance with this guideline and the policies established by the board;
- ensure that the materials in the OSR are collected and stored in accordance with the policies in this guideline and the policies established by the board;

- ensure the security of the OSR;
- ensure that all persons specified by a board to perform clerical functions with respect to the establishment and maintenance of the OSR are aware of the confidentiality provisions in the Education Act and the relevant freedom of information and protection of privacy legislation.

Appendix G — *Education Act* – Section 266.2

Assignment of numbers

266.2 (1) The Minister may assign an Ontario education number to a person who is enrolled or who seeks admission to be enrolled in a prescribed educational or training institution.

(2) For the purpose of assigning an Ontario education number, the Minister and prescribed educational and training institutions are authorized to collect, directly or indirectly, personal information.

(3) Subsection 39 (2) of the *Freedom of Information and Protection of Privacy Act* and subsection 29 (2) of the *Municipal Freedom of Information and Protection of Privacy Act* do not apply to a collection under subsection (2).

(4) For the purpose of assigning an Ontario education number, the Minister and prescribed educational and training institutions may use or disclose personal information and the disclosure shall be deemed to be for the purposes of complying with this Act. 1997, c. 31, s. 120.

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